

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 16049/2021**

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES:  
NO  
(3) REVISED.

**22/10/2021.**

.....  
DATE  
SIGNATURE

In the matter of

**GILLIAN ROSALIE MORANDUZZO**

**APPLICANT**

**and**

**RAZAAN STEWART**

**FIRST RESPONDENT**

**CITY OF JOHANNESBURG**

**SECOND RESPONDENT**

---

**JUDGMENT**

---

**OOSTHUIZEN-SENEKAL CSP AJ:**

### *Introduction*

[1] This is an application where Gillian Rosalie Moranduzzo (“the applicant”) seeks the ejectment of Razaan Stewart (“the First Respondent”), from the leased property namely, 5 Braeside Road, Greenside, Johannesburg, Gauteng Province.

[2] The applicant also seeks an order for liquidated damages for unpaid rental in the amount of R 185 400.00, alternatively R153 900.00 plus interest calculated at the prescribed rate from date of service of the application to date of the payment.

[3] At the outset the applicant’s counsel explained that the respondent vacated the property on 31 August 2021 and as a result, the applicant would no longer be persisting with the relief sought in respect of the ejectment of the first respondent.

[4] The issue before me, therefore, is concerned with the amount arrear rental only

[5] The first respondent contends, firstly that there was no written lease agreement entered into between the parties, secondly she avers that at the stage she fell into arrears with rental it was agreed that the applicant would write off any outstanding amounts owed by the first respondent in terms of the lease.

### *Relevant background facts*

[6] The applicant contends the first respondent failed to pay her rental in the circumstances in which she was obliged to do so and as a result the lease agreement was validly terminated on 3 November 2020. Furthermore, that prior to the said date, the first respondent was in unlawful occupation of the leased property because of her failure to pay the rent.

[7] The first respondent’s defence is that during September 2020 the parties agreed that the outstanding rental amount would be written off. She further argued that the amount of arrear rental is not calculated correctly. Furthermore, that no written lease agreement was concluded between the parties.

[8] The common cause facts are:

1. On 1 November 2016 a written/oral lease agreement was concluded between the parties in respect of the property;
2. On 11 November 2016 the first respondent took possession of the property;
3. During November 2016 until October 2017 the first respondent paid the rental timeously;
4. During November 2017 the lease agreement was renewed on the same terms and conditions;
5. In November 2017 the first respondent experienced financial difficulties, which let her fell into arrears on the rental,
6. For a period of three years the first respondent failed to pay the full rental;
7. On 3 November 2020 the applicant served a notice of termination of the lease agreement on the first respondent;
8. After 11 November 2020 the first respondent was in unlawful occupation of the property;
9. On 29 March 2021 the applicant instituted legal proceedings for the eviction of the first respondent and also claimed the arrear rental;
10. The first respondent vacated the property on 31 August 2021.

[9] Facts in dispute are:

1. The nature of the lease agreement, written or oral,
2. Terms of the lease agreement relating to the rental amount;
3. The total rental in arrears; and
4. Whether the arrears were written off by the applicant.

#### *Submissions by the applicant*

[10] The applicant conceded that the lease agreement was not signed by both parties on 3 November 2016, but the first respondent acknowledged receipt thereof via an email dated 7 November 2016. It was the common understanding of the parties that the first respondent's occupation of the leased premises would be governed by the written lease agreement and the parties conducted themselves in accordingly.

[11] The terms of the lease agreement are not in dispute. The following terms appear from the lease agreement:

1. The lease agreement would commence on commencement date, 1 November 2016 and expire on the expiry date, 1 April 2017. If the first respondent wanted to renew the lease agreement, she would be obliged to provide the applicant with written notice not later than two months prior to the expiry date, see clause 7;
2. The monthly rental payable was R 5800.00 per month including electricity and water, see clause 4;
3. The monthly rental would increase 10% per annum, see clause 4,
4. The monthly rental was to be paid in advance and free of deductions by no later than the second day of each month, see clause 4;
5. In event that the first respondent failed to pay any rent or amount due in terms of the lease agreement on the due date, this would constitute a breach of the leased agreement. The first respondent would have fourteen days, from receipt of a written notice demanding payment, to remedy that breach. Should she fail to do so, the applicant would be entitled to cancel the lease agreement without any further notice and assume possession of the leased premises and be entitled to claim any rent or damages due, see clause 13.

[12] Council submitted that the first respondent failed to pay the full rental owed to the applicant in breach of the lease agreement of November 2017. The first respondent has been in arrears ever since. It was argued that the first respondent failed to make full and timely payments. The applicant on numerous occasions followed up with the first respondent and requested her to pay the full rental on time. The first respondent provided various excuses and reasons for the failure to adhere to the terms and conditions of the rental agreement.

[13] The applicant's council submitted that the lease agreement was terminated by delivering a cancellation notice to the first respondent on 3 November 2020. The email clearly and unambiguously recorded the following:

*“Notwithstanding the numerous written demands for payments, you have failed to pay the arrear rental.*

*In the circumstances, I hereby cancel the lease with immediate effect. You are required to leave the property by no later than Sunday, 11 November 2020.”*

[14] Council for the applicant submitted that the respondent fell into arrears since November 2018. The arrears were set out as following:

1. 2018: Due: R 75 000,00  
Paid: R46 400.00  
Arrears: R 29 200.00
2. 2019: Due: R 75 600,00  
Paid: R40 000.00  
Arrears: R 64 800.00
3. 2020: Due: R 75 600,00  
Paid: R18 000.00  
Arrears: R 57 000.00

[15] It was further contended that on 29 March 2021, the date of the founding affidavit, the rental in arrears amounted to R 153 000,00. It was further contended by the applicant that the Court has no discretion whether or not to order the first respondent to pay the arrear rental. There is no dispute that the arrear rental is due and payable.

*Submissions by the first respondent*

[16] The first respondent's arguments relates to two points *in limine* relating, firstly to Mootness and, secondly that the applicant did not serve a report from the City of Johannesburg in the matter.<sup>1</sup> In view of the first respondent's vacation of the property the points *in limine* are not relevant anymore and therefore will not be discussed for purposes of the judgment.

[17] The first respondent conceded that she was in arrear rental in terms of a lease agreement. She also conceded that she remained in occupation of the property after receiving the written cancellation notice on 3 November 2020.

[18] The first respondent is unrepresented in the matter. On 23 September 2021 an email setting out further submissions by the first respondent was uploaded on case lines.

[19] The first respondent attacked the validity of the lease agreement and she argued that the lease agreement was not signed by both parties. According to her there was no consensus on a number of clauses contained in the lease agreement. One of which was the burglary clause. She further argued that the lease agreement was only provided to her after her occupation of the property.

[20] The first respondent argued that the amount rental of R 6 300.00 was incorrect and the agreement was that the amount of rental would be R 6 000.00 per month.

[21] It was argued that amounts in schedule FA4 attached to the founding affidavit of the applicant were incorrect as there were months during 2019 that the first respondent paid more than R6 000.00. According to the argument by the first respondent, the applicant was fabricating evidence in order to claim additional money from her. She referred to paragraph 30 of the founding affidavit stating;

*“At the start of the second year of the first respondent's occupation, the parties agreed that the rent would be R 6 300.00 (six thousand three hundred rand). I mention*

---

<sup>1</sup> Section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998.

*that this was less than the agreed 10% escalation I agreed to a lower escalation because at the time, I considered the 1<sup>st</sup> respondent and Michael ( the 1<sup>st</sup> respondent's son) to be ideal tenants and because the respondent had mentioned that she was finding it difficult to pay the rent. I said rent could be paid at the old rate for a further 2 months and thereafter the shortfall would be added to subsequent payments. There were no express agreements in relation to an extension of the lease period or the rental payable as from this point the 1<sup>st</sup> respondent fell into arrears.”*

[23] The first respondent stated that she closed her bank account and therefore has no access to her bank account. However, she referred to a payment made by her on 10 November 2016 in the amount of R 11 100.00, which according to the applicant in her founding affidavit was the deposit and the first month's rent.

[24] The first respondent argued that there were no verbal agreement to pay the amount of R6 300.00 per month. She contended that if that was indeed the case, at least one payment in the said amount would have reflected on the applicant's schedule FA4, seeing that payments were made in the amount of R 5 800.00. She avers that it is therefore reasonable to conclude that that was the amount agreed upon for rental.

[25] She further contended that the applicant agreed to “erase” the previous debt due to her circumstances. It was further argued that during November 2020 the applicant was willing to write off the outstanding debt with the provision that she vacate the property within seven (7) days which period was unreasonable as she had nowhere to go.

### *Evaluation*

#### *Existence and Validity of the Lease Agreement*

[26] Firstly, the first respondent alleges that the lease agreement was not signed by her, as such the agreement was not a valid lease agreement. It is not disputed that the lease agreement was signed by the applicant on 3 November 2016 after which the

document was emailed to the first respondent which she received. The respondent replied via email as follows:

*“Thank you very much for sending this through. I’ve been trying to load a new beneficiary but got stuck without the branch code. Would be grateful if you could send it to me so that I can make the payment.”*

[27] Following the above communication the first respondent thereafter paid the amount of R 11 100.00, the deposit and first month’s rent, into the bank account provided by the applicant.

[28] It is clear from the above actions by the first respondent even though the lease agreement was not signed by her, her conduct indicated her acceptance of the lease agreement as being binding on her.

[29] The first respondent took possession of the property on 3 November 2016, which also indicates that by taking possession of the dwelling (the property) as well as payment of the rental gives the lease agreement the same effect as if it had been signed by the first respondent. It is clear that the true intention of the parties can be ascertained from the circumstances surrounding the conclusion of the lease agreement and the subsequent conduct of the parties, which approach was affirmed by common law.

[30] As stated in the case of *Roberts v Martin*<sup>2</sup> where the landlord in the matter handed back the occupation and accepting rent for a property, dragged his feet in signing the lease agreement that the terms of the parties’ agreement was valid even though not signed by both parties or not.

[31] This was confirmed in section 5 (1) of the Rental Housing Act<sup>3</sup> which stipulates;

---

<sup>2</sup> 2005 (4) SA 163 (C) on page 168.

<sup>3</sup> Act 50 of 1999.



*“A lease between a tenant and a landlord, subject to subsection (2) need not be in writing or be subject to the provisions of the Formalities in Respect of Leases of Land Act. 1969 (.Act No. 18 of 1969).”*

[32] Furthermore section 5 of the said legislations states;

*“If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month’s written notice must be given of the intention by either party to terminate the lease”.*

[33] The Consumer Protection Act<sup>4</sup> in Chapter 2 Part G, section 50 (2) states the following;

*“(2) If a consumer agreement between a supplier and a consumer is in writing, whether as required by this Act or voluntarily—*

*(a) it applies irrespective of whether or not the consumer signs the agreement; and*

*(b) the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of that agreement, which must—*

*(i) satisfy the requirements of section 22; and*

*(ii) set out an itemised break-down of the consumer’s financial obligations under such agreement.*

*(3) If a consumer agreement between a supplier and a consumer is not in writing, a supplier must keep a record of transactions entered into over the telephone or any other 10 recordable form as prescribed.”*

[34] The first respondent further argued that she was not comfortable with the “*burglary clause*” included in the lease agreement. Clause 9 of the schedule stipulates the following:

---

<sup>4</sup> Act 68 of 2008.

*“The lessee shall be responsible for repairing at his own cost, all damages to the leased premises caused by or arising from any actual or attempted forced entry, theft or burglary.”*

[35] It is important to distinguish between two types of obligations that may be imposed by law on a contracting party, namely implied and tacit terms.<sup>5</sup> Terms implied by law has no consequences upon a contract, and is known as an “implied term”.

[36] In the matter of *Swart v Smuts*<sup>6</sup> Corbett AJA stated the following;

*"Die regsbeginsels wat van toepassing is by beoordeling van die geldigheid of nietigheid van 'n transaksie wat aangegaan is, of 'n handeling wat verrig is, in stryd met 'n statutêre bepaling of met verontagsaming van 'n statutêre vereiste, is welbekend en is alreeds dikwels deur hierdie Hof gekonstateer (sien Standard Bank v Estate Van Rhyn 1925 AD 266; Sutter v Scheepers 1932 AD 165; Leibbrandt v South African Railways 1941 AD 9; Messenger of the Magistrate's Court, Durban v Pillay 1952 (3) SA 678 (AD); Pottie v Kotze 1954 (3) SA 719 (AD), Jefferies v Komgha Divisional Council 1958 (1) SA 233 (AD); Maharaj and Others v Rampersad 1964 (4) SA 638 (AD)). Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die onderhawige wetsbepaling self nie uitdruklik verklaar dat sodanige transaksie of handeling van nul en gener waarde is nie, die geldigheid daarvan uiteindelik van die bedoeling van die Wetgewer afhang. In die algemeen word 'n handeling wat in stryd met 'n statutêre bepaling verrig is, as 'n nietigheid beskou, maar hierdie is nie 'n vaste of onbuigsame reël nie. Deeglike oorweging van die bewoording van die statuut en van sy doel en strekking kan tot die gevolgtrekking lei dat die Wetgewer geen nietigheidsbedoeling gehad het nie."*

[37] I am of the view that the first respondent's reliance on the “burglary clause” and the non-complainance clause does not affect the validity of the rental agreement, the said clause is an implied term of the rental agreement.

<sup>5</sup> The Law of Contract in South Africa, RH Christie, 5<sup>th</sup> edition on page 160.

<sup>6</sup> 1971 (1) SA 819 (A) On page 829 paragraph C-G.

[38] Furthermore, even though the first respondent was not satisfied with the said clause, she took possession of the property and paid the rental as well as the deposit as stipulated in the lease agreement. She further complied with the terms and conditions of the lease agreement from November 2016 until June 2018, a clear indication that the first respondent agreed to the terms and conditions of the lease agreement even though the lease agreement was not signed by her.

[39] Furthermore, if the first respondent had serious concerns regarding the “*burglary clause*”, the issue should have been clarified prior to taking possession of the property and or paying the rental and the deposit as required by the lease agreement.

[40] I cannot lose sight of the fact that the first respondent remained on the property from November 2016 until 31 August 2021, and if her argument is accepted, she remained on the property for nearly five (5) years without a lease agreement being concluded. This seems highly improbable. The first respondent is a rental agent and as such she knew what the legal requirements relating to rental properties are. As such, I am satisfied that she understood that the occupation of the leased property would be governed by the lease agreement.

[41] I am therefore unconvinced by the argument of the first respondent that the lease agreement entered into between the applicant and the first respondent was not a valid lease agreement. I found that even though the lease agreement was not signed by the first respondent, that a valid lease agreement came into existence between the parties and the possession of the property by the first respondent was governed by the lease agreement.

#### *Amount due to the applicant*

[42] The first respondent alleges that the outstanding amount of rental was not calculated correctly, and therefore a factual dispute arose. She submitted that if a factual dispute arises the court has to refer the case for trial. This argument is flawed.

In *Wightman Heher JA* stated “A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.”<sup>7</sup> I find the disputes about the amount owing are tactical in nature and are unconvincing.

[43] In the case of *Soffiantini v Mould*<sup>8</sup>, it was stated that a court must make “*robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.*”

[44] With regard to the applicant’s money claim, the amounts paid and owed are clearly set out in paragraph 34, 37 and 40 of the founding affidavit. The amounts owing in respect of rental is a straight forward mathematical calculation and to go on trial for this reason alone would be contrary to the decision as stated above.

[45] The lease agreement clearly states that the rental amounts to R 5 800.00 per month. The said amount would escalate annually by 10%. Therefore, during year 2 the rental was R 6 300.00. The first respondent continued paying rental in the amount of R 5 800.00 from November 2017, therefore at the end of October 2018 she was in arrears in the amount of R 29 200.00, at the end of November 2019 she was in arrears in the amount of R 35 600,00 and at the end of October 2020 the arrears were R 57 600 .00. For the period November 2020 until March 2021 the amount in arrears was R 31 500,00. Therefore, the total amount in arrears were R153 900.00.

[46] The applicant is seeking outstanding rental and I find that the quantum is easily ascertainable. I do not find that a dispute of fact exists in respect of the quantum and

---

<sup>7</sup> *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).

<sup>8</sup> 1956 (4) SA 150 (E), also see *King William’s Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E).

it would be incorrect to refer this matter to oral evidence, especially since the amounts can be readily assessed by a simple calculation.

[47] Furthermore, the amount outstanding on arrear rental was not disputed by the first respondent in her opposing affidavit. In compliance with the Uniform Rules The first respondent has to state clearly whether she admits or denies the allegations in the founding affidavit of the applicant.<sup>9</sup> She has failed to do so.

### *The law*

[48] The first respondent raised the defence that there is a factual dispute as to the rental in arrears during arguments. She argued that on a date unbeknown the applicant agreed to waive the outstanding rental. Waiver must be properly pleaded. There is however no indication of this because of the following,

1. The date of the agreement of waiver,
2. The term of which the arrear rental will be waived, and
3. The amount to be waived by the applicant.

[49] The first respondent seems to rely on Rule 6(5)(g) of the Uniform Rule of Court where a factual dispute arises, due to the rental arrears not being correctly calculated by the applicant. I have to examine the assertion and in order to satisfactorily determine whether a real dispute of fact exists.

[50] A real, genuine and bona fide dispute of fact can only exist where the court is satisfied that the party who purports to raise the dispute has in her affidavit *seriously and unambiguously* addressed the facts said to be disputed.<sup>10</sup>

[51] There is, in law, no dispute of fact:

1. Where the respondent's denial does not raise a *bona fide* or genuine dispute of fact; or
2. Where the respondent's denial is far-fetched and untenable.

---

<sup>9</sup> Rule 6(5)(d)(ii) of the Uniform Rules of Court

<sup>10</sup> See footnote 6 above.

[52] Where a factual dispute arises in an opposed application, the court may in some instances nonetheless grant the application. The *Plascon Evans rule* is that if on the facts stated by the respondent together with admitted facts in the applicant's affidavit, the applicant is entitled to the relief, a court will make an order giving effect to such a finding.<sup>11</sup>

[53] Disputes of fact in motion proceedings was revisited in *National Scrap Metal (Cape Town)*,<sup>12</sup> it was inter alia held that the court would accept the respondent's version unless it was clearly untenable.

[54] I am cognisant of the fact that the first respondent is undefended in the matter, her concession however when looking at the respondent's answering affidavit in the first paragraph where the first respondent stated that:

*"I have been trying my very best in the **last 4 years** to build myself up and earn enough to pay the landlord and to move out from this property to somewhere safe and peaceful for my son and I."*

[55] The first respondent avers that;

1. The outstanding rental was calculated incorrectly, and
2. That at some stage the applicant stated that the rental in arrears will be written off.

[56] On 3 November 2020 the applicant forwarded a notice of demand for the payment for arrear rental owed and cancellation of the lease agreement to the first respondent. See "FA9" Paragraph 2 of the notice which states,

*"You have failed to pay the full rental due since **November 2017**. You are currently in arrears in the amount of **R 134 700.00**, which does not take into account the yearly*

<sup>11</sup> *Plascon-Evans Paints Ltd. v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) on page 634 (E) to page 635 (C).

<sup>12</sup> *National Scrap Metal (Cape Town) Pty Ltd & Another v Murray & Roberts Limited & Others* 2012 (5) SA 300 (SCA).

*increase difference stipulated as per the contract agreement or interest owed on arrears..*

*Failure to pay the rent is a material breach of the lease.*

*I demand payment of the arrear rental due in writing on the following dates: 8 December 2018, 27 February 2020, 5 March 2020 and 26 September 2020 in addition to various verbal conversations on the matter.*

*Notwithstanding the numerous written and verbal demands for payment you have failed to pay the arrear rental.*

***In the circumstances, I hereby cancel the lease agreement with immediate effect. You are required to leave the property by no later than Wednesday, 11 November 2020.”***

[57] The last paragraph of the notice stated the following,

***“NB. Please note, if you willingly vacate the property by Wednesday, 11 November 2020, I am willing to waive my claim for payment of the arrear rental. This is a once off offer. If you have not vacated by Wednesday, 11 November 2020 I will claim the full debt due to me in court.”***

[58] The contents of the above notice clarifies the following issues as to the first respondents claims, firstly, on 11 November 2020 the rental owed and due to the applicant amounted to R 134 700.00, which was not disputed by the first respondent, furthermore, the first respondent did not respond to the notice with specific reference to the outstanding rental. This was also not addressed in the first respondent’s opposing affidavit.

[59] Secondly, the first respondent contended that the applicant waived the outstanding rental, which is in part true, however what slipped the mind of the first respondent was the fact that there was a condition attached to the proposed waiver of the outstanding rental. The condition stated clearly that the outstanding rental, which amounted to

R 134 700.00 would be written off if the first respondent vacated the property on a stipulated date. The first respondent did not comply to the condition and therefore the offer fell away.

[60] In the Notice to Oppose dated 23 April 2021 the first respondent stated that “*the statement of the account and amount reflected in the application still needs to be reviewed.*”

[61] The averment relating to the monetary claim by the applicant in the founding affidavit stated clearly the amounts and periods of rental due and in arrears. The amounts in arrears were never disputed by the first respondent in her opposing affidavit, the averments relating to the amount not being correctly calculated was only made in an email dated 29 September 2021, which was uploaded under the heading “*Further Written Submissions*”.

[62] The allegations pertaining to the existence of a factual dispute on the side of the first respondent was vague and unsubstantiated and therefore I find it unnecessary to refer the matter to trial.

### *Conclusion*

[63] I find that the first respondent did not make out a case in support of a real, genuine, *bona fide* dispute of facts. The first respondent’s argument that the calculated rental due and that the applicant waived her right to claim outstanding rental is far-fetched and untenable. I am therefore rejecting it on the papers. Therefore the applicant is entitled to an order for the payment of the arrear rental as of right.

[64] The applicant applies for a monetary order in the amount of R153 000.00, this amount was the outstanding amount on date of the application. However, the arrear rental amount escalated since the date of notice of motion and is currently outstanding in the amount of R185 400.00.



[65] The notice of motion issued stated the amount of rental in arrears until March 2021 was the amount of R153 000.00. The amount is also the amount claimed by the applicant in the Notice of Motion. The applicant did not apply for an amendment relating to the amount claimed, and therefore the higher amount cannot be considered by the court.

*Costs*

[66] No order pertaining to costs is requested by the applicant.

*Order*

[ 67] In the premises the following order is made;

The first respondent is ordered to make payment to the applicant of the amount of R153 900.00 plus interest calculated at the rate of 7.2% from 1 April 2021 to date of payment.

---

**CSP OOSTHUIZEN-SENEKAL**  
**Acting Judge of the High Court,**  
**Gauteng Local Division,**  
**Johannesburg**

DATE OF HEARING: 06 October 2021

DATE OF JUDGEMENT: 22 October 2021

APPEARANCES:

COUNSEL FOR APPLICANT: Adv Luc Spiller

INSTRUCTED BY: Ms A Cachalia

Cell no: 079 144 1551

Email: [acachalia@thulamelachambers.co.za](mailto:acachalia@thulamelachambers.co.za)

RESPONDENT IN PERSON: Razaan Stewart

Cell No: 074 501 6328